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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE ex rel. THOMAS J. ORLOFF, as District Attorney, etc., et al. Plaintiffs and Appellants, v. PACIFIC BELL et al. Defendants and Respondents.	A089528 (Alameda County Super. Ct. No. 816635-9)

The district attorneys of three Bay Area counties—Alameda, San Mateo, and Monterey—appeal from a judgment dismissing their suit for injunctive relief and civil penalties under the unfair competition law (UCL). The trial court sustained a general demurrer by respondent public utility without leave to amend after concluding its subject matter jurisdiction over the suit was preempted. For reasons that will appear, we affirm.

BACKGROUND

Acting in the name of the People, appellant district attorneys[1] filed their complaint in the Alameda County Superior Court on September 2, 1999, seeking statutory remedies including injunctive relief under the UCL for alleged unfair and deceptive advertising by respondent.[2] The complaint targeted three services marketed to telephone customers by the utility—call blocking, "custom calling" features, and inside telephone wire repair

[1] For convenience, throughout this opinion we refer to the plaintiff in the plural, as the district attorneys.

[2] Again, for convenience, throughout this opinion we refer to the collective defendants in the singular, as Pacific Bell.

insurance—as the subject of the alleged deceptive practices. With respect to the marketing of each service, the complaint alleged, the utility had deceived its customers by false and misleading advertising. Pacific Bell and Telesis Group filed a general demurrer to the complaint, contending that because administrative proceedings seeking comparable relief for the identical alleged misconduct were pending before the Public Utilities Commission (commission), the superior court's subject matter jurisdiction over the cause was ousted by section 1759 of the Public Utilities Code (unspecified statutory references are to this code).

The proceedings before the commission to which respondent referred in its demurrer were commenced in 1998 by several consumer advocacy groups and labor unions, which filed serial administrative complaints attacking the utility's marketing of its call blocking, custom service, and inside wire repair services, the same marketing practices challenged by appellants in this lawsuit. Some of these administrative complaints included claims that the challenged conduct violated the UCL. The separate proceedings were consolidated before an administrative law judge, who held two weeks of evidentiary hearings and filed a tentative ruling for the commission's review on December 22, 1999.

The administrative law judge (ALJ) found respondent had failed to meet the disclosure standards prescribed in the relevant public utilities statute (§ 2896) because customers were not fully informed about the two call blocking options. Regarding the custom calling issue, the ALJ found respondent's sales strategy was designed to convey a mistaken impression to customers and failed to meet the requirements of its current tariff. She also found respondent had failed to present customers with sufficient information regarding alternative inside wire repair services. The ALJ's decision recommended multiple remedies, including ordering respondent to deposit $25 million in a customer education fund and imposing a fine in the amount of $20 million, half of which would be stayed pending compliance with the decision. That proposed ruling was appealed to the commissioner assigned to the case (Assigned Commissioner Neeper), who filed a lengthy

decision reaching somewhat different results on July 13, 2000.[3] The alternative decisions are now pending review before the full commission.

Following briefing and oral argument, the superior court sustained respondent's demurrer without leave to amend, ruling it lacked jurisdiction to proceed in light of the ongoing adjudicatory proceedings before the commission challenging identical conduct and asserting similar claims for relief. This appeal timely followed.

ANALYSIS

This appeal presents the intersection ("collision" might be more apt) of competing legislative policies embodied in separate statutory schemes. On the one hand, in those matters lying within its broad administrative ken, the Legislature has decreed the preemptive power of the commission to oust, under articulated circumstances, the exercise of all judicial jurisdiction except that of the Supreme Court and the Court of Appeal. (§ 1759, subd. (a).)[4] On the other hand, the Legislature has conferred similarly broad powers on public law enforcement officials—represented by the state's Attorney General and its 58 county district attorneys—to enforce statutory remedies against consumer fraud and other unfair business practices under the UCL. (Bus. & Prof. Code, §§ 17200, 17500; *People v. McKale* (1979) 25 Cal.3d 626.) The question presented by this appeal is, when the two schemes collide, which scheme trumps?

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[3] In a revised decision dated November 2, 2000, Commissioner Neeper proposed that respondent be fined $2,373,000 for call blocking violations and failure to inform customers of less expensive optional services; in addition, the revised decision determined that further action against respondent under the UCL was not necessary. We grant the requests to judicially notice the alternative administrative decisions. (Evid. Code, § 452.)

[4] Section 1759 provides, "(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties as provided by law and the rules of court. ¶ (b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases."

Respondent public utility contends that, because the subject matter of appellants' UCL complaint in the superior court is substantially identical to the subject of adjudicatory proceedings currently pending before the commission, the trial court's jurisdiction to proceed is preempted by section 1759 and the cases construing it. The appellant district attorneys counter with the proposition that their law enforcement role under the UCL is of equal dignity with the commission's regulatory jurisdiction and that this "parallel" lawsuit should be permitted to go forward apace, notwithstanding the concurrent administrative proceedings. Neither side cites case or other legal authority squarely for or against appellants' position. We have found none. Although we must decide the case in the absence of authority directly in point, there are standards to which we resort for guidance.

In *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893 (*Covalt*), our Supreme Court considered whether a claim for damages and related relief brought against a public utility by homeowners, stemming from fears that nearby electrical high transmission lines exposed them to the threat of cancer, was preempted by section 1759. The utility had set up the statute as a jurisdictional defense, arguing the suit was barred by the commission's statutory jurisdiction to regulate electrical powerlines. The trial court overruled a demurrer to the complaint, but the Court of Appeal reversed. Granting review, the Supreme Court affirmed the appellate ruling ordering the demurrer sustained without leave to amend. (*Covalt, supra,* 13 Cal.4th at p. 914.) Building on its prior decision in *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, the *Covalt* court wrote "[u]nder the *Waters* rule . . . an action for damages against a public utility pursuant to section 2106 is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but *also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy*." (*Covalt, supra,* 13 Cal.App.4th at p. 918, italics added.)

The opinion in *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, is an instructive example of circumstances under which judicial jurisdiction is *not* ousted

by section 1759. Plaintiffs alleged price fixing claims against two cellular telephone service companies, asserting an unlawful antitrust conspiracy in violation of the Cartwright Act. (Bus. & Prof. Code, § 16720 et seq.) (See *Cellular Plus, Inc. v. Superior Court, supra,* 14 Cal.App.4th at pp. 1242-1247.) In sustaining defendants' demurrer to the complaint, the trial court ruled the utilities were immune from Cartwright Act liability because of the commission's exclusive jurisdiction over utility ratemaking. Relying on the jurisdictional formulation in *Waters, supra,* 12 Cal.3d 1, the Court of Appeal reversed. "We cannot conceive," it wrote, "how a price fixing claim under the Cartwright Act could 'hinder or frustrate' the PUC's supervisory or regulatory policies. The only apparent policy of the PUC that could be affected is its regulation of rates charged by cellular telephone service providers. However [plaintiff] does not dispute that the PUC has jurisdiction over rates, nor does it seek any relief requiring the PUC to change any rates it has approved. [Plaintiff] is merely seeking treble damages and injunctive relief for alleged price fixing under the Cartwright Act." (*Cellular Plus, Inc. v. Superior Court, supra,* 14 Cal.App.4th at p. 1246.)

And in *Stepak v. American Tel. & Tel. Co.* (1986) 186 Cal.App.3d 633, plaintiffs were minority shareholders of a public utility that had merged with another utility. Alleging the merger was unfair to them, plaintiffs sought declaratory relief and an injunction halting the merger. The utilities moved to dismiss, asserting the commission not only had exclusive jurisdiction to approve the merger, but in administrative proceedings had determined it was fair to minority shareholders. Reversing a trial court order dismissing the suit on jurisdictional grounds, the Court of Appeal relied on *Waters, supra,* 12 Cal.3d 1: "Our case is distinguishable from *Waters* and other cases where the subject of the superior court action is addressed by commission regulation. [Citations.] We are aware of no 'declared supervisory and regulatory policies' . . . ever formulated or relied on by the commission on the subject of safeguarding minority investor interests. Applying the *Waters* test of jurisdiction, we cannot conceive of how the superior court's award of damages or other relief to wronged minority shareholders would 'hinder or frustrate' . . . declared commission policy." (*Stepak v. American Tel. & Tel. Co., supra,* at pp. 640-641.) The rule to be derived from this line of cases was encapsulated by the

high court in *Covalt, supra*, 13 Cal.4th at pp. 918-919: "When the bar raised against a private damages action has been a ruling of the commission on a single matter such as its approval of a tariff or a merger, the courts have tended to hold that the action would not 'hinder' a 'policy' of the commission within the meaning of *Waters* and hence may proceed."

On the other side of the line lie those cases holding superior court jurisdiction *is* preempted by section 1759 under identifiable circumstances. For example, *Schell v. Southern Cal. Edison Co.* (1988) 204 Cal.App.3d 1039 involved legislation requiring the commission to establish so-called "baseline" quantities of natural gas and electricity for residential distribution at below market rates. Plaintiff sued the utility for damages and declaratory relief, contending that as the owner of a recreational vehicle park he was entitled to purchase and distribute gas and electricity to his tenants at baseline rates. In prior proceedings under the statute, the commission had designated baseline quantities on an interim basis, ruling the statutory term "residential customer" did not include transient trailer parks such as plaintiff's. Affirming the trial court's sustention of a demurrer without leave to amend, the appellate court took judicial notice of administrative matters pending on the commission's docket challenging the rate classification for baseline quantities and the exemption of recreational vehicle parks. (*Id.* at p. 1045.) Noting the commission had directed the defendant public utility to conduct a study of the need for and feasibility of changes in tariff rates, the court concluded that the "decision as to whether or not master-metered residential recreational vehicle parks should be charged at the same rate as [similar] mobile-home parks . . . is clearly within the exclusive purview of the PUC as part of its continuing jurisdiction over rate making and rate regulation in provision of baseline service to residential customers of the electric and gas corporations." (*Id.* at p. 1046.)

In *Brian T. v. Pacific Bell* (1989) 210 Cal.App.3d 894, this court affirmed dismissal of a suit by parents seeking damages and injunctive relief requiring telephone companies to adopt a specific technology (customer access codes) to restrict minors' access to sexually explicit messages. Because the commission had held hearings on the issue and was pursuing an ongoing investigation into the optimal means of restricting

such access by minors, section 1759 applied to preempt the courts from exercising jurisdiction over litigation aimed at producing the same result. (*Id.* at p. 907.) The *Covalt* opinion formulated the rule expressed in this latter line of cases as being one in which "the relief sought would have interfered with a broad and continuing supervisory or regulatory program of the commission, [and] the courts have found such a hindrance and barred the action under section 1759." (*Covalt*, *supra*, 13 Cal.4th at p. 919.)

It is not difficult to foresee that in this litigation factual and legal conflicts with ongoing commission proceedings are, if anything, even *more* likely to arise than they were in *Covalt*, *supra*, 13 Cal.4th 893; here, the commission is not engaged in preliminary rulemaking as in *Covalt*, but in actually adjudicating concrete claims for relief against the utility growing out of the *same* marketing practices attacked by appellants in their complaint in this case. The legal and factual issues before the commission in the adjudicatory proceedings described above are, in other words, identical to those presented to the superior court by appellants' UCL complaint, a "Xerox copy," as respondent's counsel put it in argument before the trial court. Appellants' UCL suit thus falls within the *literal* language of section 1759, as a proceeding in which the trial court exercised "jurisdiction to . . . reverse, correct or annul [an] order or decision of the commission . . . ." (§1759, subd. (a).) In light of that circumstance, if appellants were private litigants, this would be an a fortiori case for affirmance under the statute and the cases construing it. The narrow question we must decide, then, is whether the *public* character of appellants takes the case out of the preemption formulation applied in *Covalt* and the precedents on which it rests.

II

Appellants, along with the Attorney General and the California District Attorneys Association (CDAA) as supporting amici curiae, present an array of arguments to distinguish their lawsuit from UCL litigation brought by private plaintiffs. First, they contend the Legislature has, at least by implication, carved an exception to the preemption imposed by section 1759 for those UCL proceedings prosecuted by the Attorney General and subsidiary law enforcement agencies. The argument hinges on a

single sentence in the high court's opinion in *People v. Pacific Land Research* (1977) 20 Cal.3d 10 (*Pacific Land Research*), that a UCL action "filed by the People seeking injunctive relief and civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Id*. at p. 17.) That case, however, was a suit by the Attorney General seeking restitution for fraudulent land sales; the court made the statement relied on in reaching the conclusion that public UCL proceedings did not require the pre-judgment notice to the class of affected consumers that a private class action would require. (*Id*. at p. 18.) Relatedly, appellants argue the remedies under the UCL are "cumulative," and in addition to other remedies, including those available before the commission, citing section 17205 of the Business and Professions Code.[5]

Notwithstanding the accuracy of the court's statement in *Pacific Land Research, supra*, 20 Cal.3d at page 17, we think its broad generality is insufficient to overcome contrary high court precedent in a closely analogous area that, as we explain, is persuasive on the issue whether UCL litigation by law enforcement officials is exempt from the preemptive sweep of section 1759. In *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377 (*Farmers*), the Attorney General instituted proceedings under the UCL seeking injunctive relief and civil penalties against several insurers for their alleged failure to offer eligible insureds the "good driver discount" established by passage of Prop. 103. (*Id*. at p. 381.) Defendant insurers sought to stay the litigation pending resort to administrative proceedings before the Insurance Commissioner, whose department administers Prop. 103. Both the trial court and the Court of Appeal denied the stay requests, the latter on the ground that the UCL proceeding was "cumulative" to other remedies and thus not foreclosed by the availability of administrative relief. (*Id*. at p. 383.) Granting review and reversing, the Supreme Court ordered the suit stayed,

[5] This section provides: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."

holding it was subject to the doctrine of "primary jurisdiction" requiring initial resort to administrative proceedings before the Insurance Commissioner.[6] (*Ibid*.)

In reaching that determination, the high court expressly considered the claim of the People that UCL proceedings brought by law enforcement officials were exempt from the primary jurisdiction doctrine. Rejecting the "unsupported and novel claim that because the Attorney General is the chief law enforcement officer of the state, actions filed by him should not be subject to the primary jurisdiction doctrine," the court said that the "reasons supporting the doctrine apply to private citizens and the Attorney General alike, and the two classes of plaintiffs should be treated equally." (*Farmers*, *supra*, at p. 401.) Given this analogous precedent, we think the case for rejecting appellants' argument in the context of preemption under section 1759 is, if anything, even stronger than it was in *Farmers*. For here, we deal with a statute through which the Legislature, in the exercise of its plenary power over the commission and its authority (Cal. Const., art. XII, § 5), has allocated *subject matter jurisdiction* between the judiciary and the commission. Unlike the primary jurisdiction doctrine, which as the *Farmers* opinion notes is flexible and discretionary (*Farmers, supra,* 2 Cal.4th at pp. 391-392), the legal conception of "subject matter jurisdiction"—a court's fundamental power to act—is not; it is the opposite. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 ["Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter . . . ."].) Under its constitutional authority to vest the commission with subject matter jurisdiction, the Legislature in its wisdom has determined the courts lack the power to proceed in cases that would "interfere" with the commission's operations. (§ 1759.) For section 1759 purposes, the issue of interference is a jurisdictional, not a discretionary, touchstone.[7]

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[6] "Primary jurisdiction is a doctrine used by courts to allocate initial decisionmaking responsibility between agencies and courts where [jurisdictional] overlaps and potential for conflict exist." (2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 14.1, p. 271.

[7] Thus, while we recognize the singularly important role played by public prosecutors in instituting suits under the UCL, we are compelled by both statutory text and high court

As for the argument that jurisdiction over this suit is exempt from ouster by section 1759 because the UCL remedy is "cumulative," "[a]lthough the [UCL's] scope is sweeping, it is not unlimited . . . . Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has . . . considered a situation and concluded no action should lie, courts may not override that determination." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182.) Section 17205 declares the *remedies* afforded by the UCL to be "cumulative." As the court in *Farmers, supra*, 2 Cal.4th at page 395, put it, "section 17205 merely reflects a legislative intent that the remedy under . . . section 17200 not displace any other remedy that might exist." The provision does not purport to confer a "jurisdictional" exception for UCL proceedings, whether brought by public or private plaintiffs. The argument thus runs afoul of elementary principles of subject matter jurisdiction: a court must possess jurisdiction to proceed before any consideration of remedies is appropriate.

Second, appellants contend prosecution of this UCL proceeding by law enforcement officials promotes commission policies, citing several speeches and publications by commissioners past and present praising the enforcement "partnership" among the CDAA, the Attorney General, and the commission's enforcement staff. We have no doubts whatever concerning the accuracy of these comments or the considerable value public law enforcement provides in assisting an agency with extremely broad regulatory powers. The argument, however, overlooks the distinguishing (and decisive) feature of this case—the fact that specific adjudicatory proceedings before the commission raising the identical challenges to the utility's marketing practices and seeking comparable remedies are in full swing.[8] The potential for conflict and contradiction arising from simultaneous parallel proceedings is manifest for, as the Court

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precedent to find under these circumstances that the subject matter jurisdiction of the superior court is preempted. Arguments for a contrary result are a matter for legislative consideration.

[8] This case has generated contradictory responses from the commission. Its then-president, Dr. Richard A. Bilas, wrote the trial judge on October 5, 1999, expressing concern over appellants' UCL action, characterizing it as "closely related" to pending commission proceedings. He went on to state that the commission "has a commitment to

of Appeal wrote in a case addressing section 1759 preemption, *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, "no sensible person . . . should for a moment contend that there is an area within which the commission and the courts can legitimately reach exactly opposite and conflicting conclusions on a given set of facts."[9] (*Id*. at pp. 149-150; quoted with approval in *Waters, supra*, 12 Cal.3d at p. 11.)

Indeed, the conclusion that section 1759 operates to deprive a trial court of subject matter jurisdiction to decide the same claims pending before the commission in adjudicatory proceedings *antedates* the "interference" formulation adopted by the court in *Waters, supra*, 12 Cal.3d at page 4. (E.g., *Miller v. Railroad Commission* (1937) 9 Cal.2d 190, 197 [after water company was declared a public utility by the trial court which set its rates, the commission set different rates at petitioner's request; the trial court then held utility in contempt, ruling the commission acted without jurisdiction; commission then set a higher rate and petitioner sought review. *Held*: trial court lost jurisdiction after the commission acted; "upon [the commission's] assumption of jurisdiction over the activities of [the] utility, any order or judgment of the superior court in conflict with the orders of the commission is to that extent ineffective and of no

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working effectively with fellow law enforcement agencies and the state's judicial system to assure a coordinated and effective response to consumer protection issues involving regulated utilities." "At the same time," Commissioner Bilas continued, "we request, when appropriate, that trial courts not adjudicate matters that would work to enjoin, restrain, or interfere with the Commission in the performance of our official duties." Before this court, however, the commission, appearing through its general counsel as amicus curiae in support of appellants, has filed a brief arguing the exclusivity of its jurisdiction is somehow dependent on whether it has been declared to be so by the commission. We think the answer to this contention was provided by our high court in *Covalt*, where, responding to a similar claim by the plaintiffs there, it wrote that "[t]he question is not whether the *commission* has declared (or has the power to declare) local courts to be preempted on this or any other subject; the Legislature has declared such preemption by enacting section 1759. The question is therefore whether section 1759 applies to this case." (*Covalt, supra*, 13 Cal.4th at p. 944.)

[9] We note the obvious analogy between the operation of section 1759 and the role of the doctrine of "exclusive concurrent jurisdiction" under which "the first court to assert subject matter jurisdiction possesses the power and authority to grant equitable relief

binding effect . . . ."]; *Pacific Tel. & Tel. Co. v. Superior Court* (*Sokol*) (1963) 60 Cal.2d 426, 430 [prohibition by utility to bar superior court from proceeding to trial on customer's claim of wrongful termination of service. *Held*: prior commission ruling utility did not act wrongfully in terminating service ousted court's subject matter jurisdiction. "The mandate of the Legislature, violated by the superior court . . . is to place the commission, insofar as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court except to the extent and in the manner specified in the code itself . . . . ¶ . . . Respondent [superior court] was therefore without jurisdiction to pass upon the question presented here"]; *People ex rel. Public Util. Com. v. Ryerson* (1966) 241 Cal.App.2d 115, 122 [after commission determined carrier had undercharged customer and directed it to recover uncollected revenue, carrier sued customer; parties stipulated freight bills should be reformed to reflect their rate agreement and judgment entered thereon; commission then sued to vacate judgment. *Held*: "the judgment [of reformation] constituted, in effect, a judgment reviewing and annulling the order of the commission and, hence, was in excess of the court's jurisdiction," citing *Pratt, supra*, 228 Cal.App.2d 139].) [10]

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restraining proceedings in another court that threaten to impair [its] judgment." (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1176.)

[10] Appellants also contend this suit does not impinge on the commission's "core" functions, which they assert are confined to ratemaking and safeguarding utility services to the public, citing *Stepak v. American Tel. & Tel. Co.* (1986) 186 Cal.App.3d 633, 641. But this characterization of the commission's powers and jurisdiction is too narrow, as *Covalt, supra*, 13 Cal.4th 893, makes clear. " 'The commission is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, §§ 1-6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (*Id*. §§ 2, 4, & 6.) The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . . ." [Citation.] [¶] Pursuant to this constitutional provision, the Legislature enacted . . . the Public Utilities Act . . . . That law vests the commission with broad authority to 'supervise and regulate every public utility in the State' . . . and grants the commission numerous specific powers for the purpose. Again, however, the commission's powers are not limited to those expressly conferred on it: the Legislature

III

Last (and somewhat dramatically), appellants assert the outcome of this appeal "will determine whether Pacific Bell is beyond the reach of this state's consumer laws. At stake is the public's most significant protection against deceptive advertising and whether the public loses law enforcement advocacy, resources, relief and sanctions which the Legislature has specially designated to prosecutors through court proceedings." The result we reach in this case, however, places only a modest limitation on the law enforcement partnership between the commission and the People as represented by the Attorney General and county district attorneys. That is so because the jurisprudence of commission preemption *supports* concurrent subject matter jurisdiction where administrative events that trigger preemption under section 1759 are not present.

As the case law demonstrates, the doctrinal contours of section 1759 as they have been developed by the Court of Appeal in specific situations are as modest as they are straightforward. In circumstances under which the commission has not exercised jurisdiction to regulate the subject at issue, the superior courts possess a concurrent subject matter jurisdiction that is *not* preempted by section 1759. (E.g., *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1048 [complaint against utility alleging violations of county building code not preempted; "the PUC has not promulgated rules concerning the construction, maintenance or grading of access roads. Nor has it purported to exercise its authority over such matters"]; *Cellular Plus, Inc. v. Superior Court, supra*, 14 Cal.App.4th 1224, 1242-1247 [prosecution of antitrust price fixing claims against cellular telephone companies would not "hinder or frustrate" commission's regulatory policies and were not preempted]; *Stepak v. American Tel. & Tel. Co., supra,* 186 Cal.App.3d 633, 640-641 [suit by minority shareholders of public utility that had merged seeking

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further authorized the commission to 'do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary or convenient' in the exercise of its jurisdiction over public utilities . . . . Accordingly, 'The commission's authority has been liberally construed' [citation], and includes not only administrative but also legislative and judicial powers. [Citation.]" (*Covalt, supra,* at pp. 914-915, italics omitted.)

injunction halting the merger not preempted; court was "aware of no 'declared supervisory and regulatory policies' . . . ever formulated or relied on by the commission on the subject of safeguarding minority investor interests"]; *Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 77-78 [tort suit not preempted where commission had not acted to limit utility's liability for malfunctioning overhead wires]; *Villa v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, 479 [suit for injunction and damages for refusal to make water hookup not preempted where commission had completed ratemaking proceedings and directed utility to adopt rates].)

On the other hand, as *Covalt* points out (13 Cal.4th at pp. 920-923), in cases such as *Schell v. Southern Cal. Edison Co., supra*, 204 Cal.App.3d 1039, and *Brian T. v. Pacific Bell, supra*, 210 Cal.App.3d 894, the courts held the suits preempted under section 1759 because "so long as the matter was before the commission as part of its ongoing inquiry . . ., the superior court had no jurisdiction over the matter . . . ." (*Covalt* at p. 923; see also *Ford v. Pacific Gas & Elec. Co.* (1997) 60 Cal.App.4th 696 [trial court lacked jurisdiction over plaintiff's wrongful death action against utility based on decedent's exposure to electric and magnetic fields in light of commission's prior determination that scientific evidence was insufficient to establish dangerousness of such fields].)

The principle at work in these cases is nicely illustrated by Chief Justice Roger Traynor's opinion for a unanimous court in *People v. Superior Court* (*Dyke Water Co.*) (1965) 62 Cal.2d 515. There, the commission ordered a water utility to terminate a rate increase and directed it to submit a refund plan for the excess charges. Without submitting the required plan, the utility filed suit for declaratory relief, asking the superior court to determine "the rights and duties of the parties under the decisions and orders of the commission." (*Id*. at p. 517.) In response, the commission sought prohibition barring further superior court proceedings by the utility in the declaratory relief action, invoking section 1759. Granting the writ, the Chief Justice wrote that "[h]ad [the water company] complied with the commission's order to formulate a plan for making refunds to its customers and secured the commission's approval thereof, the appropriate trial courts *would have jurisdiction to adjudicate* any disputes between [the

water company] and third parties arising under the plan. [Citations.] By giving proper effect to an approved refund plan, the courts in such action would be acting not in derogation but in aid of the commission's jurisdiction. [¶] . . . [¶] The controlling facts are that *the whole matter of how refunds are to be made is still pending and undecided before the commission* . . . . Under these circumstances section 1759 precludes the superior court from adjudicating . . . the very issues that will *necessarily be presented to the commission in the continuing exercise of its jurisdiction* in the refund proceedings." (*Id*. at pp. 517-518, italics added.)

This passage illuminates both the circumscribed sweep of section 1759 preemption—it operates only in those limited circumstances where the commission is actively engaged in rulemaking or adjudicatory proceedings that are likely to be "interfered with" by collateral judicial proceedings—and, when applicable, the inflexibly *jurisdictional* nature of the barrier to a concurrent judicial proceeding. As respondent points out, a determination by the trial court of appellants' claims would necessarily "interfere" with the alternative dispositions presently pending before the full commission. In her resolution of the custom calling issue, for example, the ALJ ruled respondent had failed to meet the disclosure requirement imposed on it by section 2896.[11] Commissioner Neeper, on the other hand, ruled in his alternative decision the utility had not violated section 2896. Any determination of appellants' claim by the superior court is thus bound to conflict with a potential decision of the commission. A like analysis applies to the issues of call blocking and inside wire repair; in both, the ALJ and the assigned commissioner reached different conclusions.

The potential for interference with the commission is even greater with respect to the *remedies* appellants seek in this UCL suit. The decisions of both the ALJ and Commissioner Neeper require respondent to file a revised tariff rule offering customers additional information on the availability of service options, including inside wire repair

[11] As pertinent here, § 2896 provides: "The commission shall require telephone corporations to provide customer service to telecommunications customers that includes . . . all the following: ¶ (a) Sufficient information upon which to make informed choices among telecommunications services and providers . . . ."

services. In their proposed injunction filed with the trial court, however, appellants seek relief that flatly would bar the omission of "any material information when offering, marketing or selling telecommunications goods or services, which would enable a customer to make an informed choice . . . ." The obvious difficulty with this requested relief is that section 2896 requires the *commission* to determine the information sufficient to permit customers to make informed choices. Until the commission has concluded the proceedings in which it makes those determinations, the superior court will literally have no law to apply. Again, in their request for injunctive relief, appellants ask for an order barring the utility from using the terms "basics" or "essentials" in marketing custom calling features. Neither the ALJ nor Commissioner Neeper, however, embraced such a remedy; both require respondent to file a revised tariff offering additional information on service options. Whatever the ultimate outcome before the full commission, an assertion of subject matter jurisdiction by the trial court and entry of the requested injunctive relief is bound to conflict with the commission's decision and thereby "contravene a specific . . . decision of the commission . . . ." (*Covalt, supra*, 13 Cal.4th at p. 918.)[12]

CONCLUSION

The judgment of the trial court dismissing the action on jurisdictional grounds is affirmed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Kay, J.

[12] It is worth pointing out that under the commission's rules of practice, appellants either could have intervened in the pending administrative proceedings or, without seeking intervention, have participated and been heard on the merits by entering an appearance. (See CPUC Rules of Practice & Procedure, Rules 53 & 54.)

Trial Court:	Alameda County Superior Court
Trial Judge:	Honorable Henry E. Needham, Jr.
Counsel for Appellants:	Thomas J. Orloff, District Attorney Alameda County Harry B. Johnson, Senior Deputy District Attorney Julie A. Dunger, Deputy District Attorney James P. Fox, District Attorney San Mateo County John E. Wilson, Deputy District Attorney Dean Flippo, District Attorney Monterey County Lydia Villarreal, Deputy District Attorney
Counsel for Respondent Pacific Bell:	Robert Kimball Bobby C. Lawyer Carol M. Anderson
Counsel for Amicus Curiae California Public Utilities Commission	Gary M. Cohen Mary F. McKenzie Barbara J. Ferguson
Counsel for Amicus Curiae, Attorney General of the State of California	Bill Lockyer, Attorney General Richard M. Frank, Chief Assistant Attorney General Herschel T. Elkins, Senior Assistant Attorney General Michael R. Botwin, Deputy Attorney General
Counsel for Amicus Curiae, California District Attorneys Association	Lawrence G. Brown, Executive Director
Counsel for Amicus Curiae, Civil Justice Association of California	Fred G. Hiestand